Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Performance Measurements and	)	CC Docket No. 98-56
Reporting Requirements for Operations	)	RM-9101
Support Systems, Interconnection, and	)	
Operator Services and Directory	)	
Assistance	)	

1998

REPLY COMMENTS OF U S WEST, INC.

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SUMMARY

U S WEST, Inc. urges the Commission to terminate the instant NPRM or significantly recraft its structure from Model Rules to Principles. The filed comments make clear that federal intervention in the area of performance measurements and reporting models is both unnecessary and unwise. LECs,[1] including those which are BOCs, are negotiating performance measurements and reporting criteria so that they are able, variously, to demonstrate compliance with Sections 251 and 252 obligations and as a prelude to seeking Section 271 relief. With respect to all this activity, state oversight is preferable to federal insinuation in the process, even federal intervention claimed only as "guidance."

Should the Commission deem it necessary to promulgate Model Rules of any kind regarding performance measurement and reporting requirements, Rules crafted more along the line of Principles, as proposed by ITTA, would be a good starting point: comparability, data re-use, sampling, compliance auditing, confidentiality, geographic conformity, sunsetting and cost recovery.

A crucial element to any performance measurement and reporting regime, whether negotiated, imposed by State regulatory commissions in their oversight capacity or associated with mandated or guiding federal Model Rules, is cost recovery. The Commission's proposal will certainly operate to confuse the

[1] All acronyms or abbreviations used in this Summary are fully identified in the text.

responsibility for cost recovery associated with performance measurement and reporting requirements.

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I. GENERAL POSITION

The comments in this proceeding make clear that there are three possible options for the Federal Communications Commission ("FCC" or "Commission") to take with respect to the instant proceeding.[1] The Commission is asked to (1) forego its "guidance" model and mandate binding national rules regarding Operations Support Systems ("OSS"), Interconnection, Operator Services ("OS") and Directory Assistance ("DA");[2] (2) retain its proposal for "guiding model rules";[3] or (3) terminate

[1] In the Matter of Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, CC Docket No. 98-56, RM-9101, Notice of Proposed Rulemaking, FCC 98-72, rel. Apr. 17, 1998 ("NPRM"). Order extending deadline for filing reply comments, DA 98-1102, rel. June 10, 1998. Comments filed June 1, 1998.

[2] See, e.g., generally, AT&T Corp. ("AT&T"); Competitive Telecommunications Association ("CompTel"); GST Telecom, Inc. ("GST"); LCI International Telecom Corp. ("LCI"); MCI Telecommunications Corporation ("MCI"); Sprint Corporation ("Sprint"); WorldCom, Inc. ("WorldCom"). And see General Services Administration ("GSA") at 13-14 (FCC should adopt as mandatory now at least one specific numerical performance measurement target and should adopt a "backstop"

the proceeding.[4] Because U S WEST, Inc. ("U S WEST") foresees extensive

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approach where the Model Rules become mandatory at a time certain, if States have not acted).

U S WEST was surprised to see that Sprint supported the "mandated measurements" approach. It seems strange to U S WEST that any local exchange carrier ("LEC"), whether incumbent ("ILEC") or competitive ("CLEC"), would support the FCC's proposals. Indeed, while Sprint casts its vote in favor of the Commission's proposal on behalf of both its ILEC and CLEC operations, Frontier Corporation ("Frontier") takes just the opposite position on behalf of its business enterprises.

[3] See, e.g., generally, Allegiance Telecom, Inc. ("Allegiance"); Association for Local Telecommunications Services ("ALTS") at 2 (asserting its belief that binding rules could lawfully be adopted but not wanting to delay the adoption of Model Rules because of a debate around FCC jurisdiction), Bell Atlantic Telephone Companies ("Bell Atlantic") at 2-5 (suggesting the proper role/scope of Model Rules, but not outright opposing them), GTE Service Corporation ("GTE") generally; KMC Telecom Inc. and RCN Telecom Services, Inc. ("KMC/RCN") generally; MediaOne Group, Inc. ("MediaOne") at 8-10; Public Utilities Commission of Ohio and the Staff of the Public Utilities Commission of Ohio ("Ohio Staff/Commission") at 5 (cautioning against the adoption of any criteria that will potentially conflict with its rules); SBC Communications Inc. ("SBC") at 1-2 (addressing the FCC's proposal without a strong statement of support/opposition other than to note that any FCC initiative needs to build on negotiated agreements); Teleport Communications Group Inc. ("TCG") generally. As stated above with respect to Sprint's support of federal intervention in the area of performance measurements, U S WEST was surprised to see that GTE supported the issuance of guidelines (and that Bell Atlantic and SBC did not outright oppose them).

Certain carriers really express no position on the general propriety of the FCC's proposal, but argue rather for an exemption from its application for one reason or another. See, e.g., generally, East Ascension Telephone Company, Inc. ("EATEL") TDS Telecommunications Corporation ("TDS") at 1-2 (cautious support with expectation that accommodations for small, midsize and rural LECs will be made), National Exchange Carrier Association, Inc. ("NECA") at i, 2 (not openly opposing guidelines but arguing that rural telephone companies should be exempt from any federal guidelines).

[4] See, e.g., generally, ALLTEL (opposing FCC's approach with respect to small and mid-sized LECs), Ameritech, BellSouth Corporation ("BellSouth"); Cincinnati Bell Telephone Company ("CBT"); Frontier, National Telephone Cooperative Association ("NTCA") (calling federal intervention unwarranted, but asking for relief only with respect to rural LECs); United States Telephone Association ("USTA").

litigation associated with exercising either of the first two-proposed options and because the current environment has clearly produced results around performance measurements and reporting, U S WEST supports the latter course of action -- the termination of the proceeding.

While various carriers argue that binding national rules are essential either for complying with the Telecommunications Act of 1996 ("Act" or "1996 Act") or to engender competition in the local exchange, comments filed in this proceeding make obvious that such advocacy is factually incorrect. A review of the comments makes patently clear that LECs are, in fact, negotiating performance measurements and reporting criteria, as well they must under the Act, and that such negotiations are resulting in the institution of performance measurements and reporting mechanisms.

Clearly, the requirements of the 1996 Act are sufficient to get from here to there. First, under the Act, LECs are required to negotiate in good faith. Thus, to the extent that other contracting parties want to address or discuss performance measurements, LECs are not in a position to unilaterally refuse to address the matter. Second, those LECs that are also BOCs must be able to prove compliance with their obligations under Sections 251 and 252 prior to being granted Section 271 relief. These carriers, then, have a profound commercial interest in being able to agree with other carriers on measurements that will depress later contention about nondiscriminatory actions and will allow generally-agreed upon "proof" of nondiscrimination to be made in the future in a manner that incorporates reliability.

The comments of Ameritech, BellSouth and SBC make obvious that agreed-upon performance measurements and reporting models are emerging. Indeed, even AT&T's Attachment indicates that measurements are being agreed to,[5] proving the viability of the contract negotiation process (supplanted by state oversight *via* mediations and arbitrations). The need for federal intervention in this area is far from proven in, either from a statutory or public interest perspective.[6] Furthermore, the federal regulatory venue is ill-equipped to deal with the type of contention around proposed measurements that U S WEST addressed in our opening comments, as well as the type of idiosyncratic cost/benefit analysis necessary to "overruling" a failure to agree on a particular measurement.[7]

Additionally, the LEC comments addressing the Commission's specific performance measurements support U S WEST's opening advocacy that there are numerous ways in which a performance measure can be defined (some better than

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[5] AT&T's Attachment B demonstrates the extent to which a number of LECs have already agreed to measure, on a fairly disaggregated basis, performance regarding virtually all aspects of the Commission's proposed "Model Rules."

[6] Indeed, the comments of various parties, including the National Emergency Number Association ("NENA") regarding the performance measurements associated with 911 provisioning, graphically demonstrate how unnecessary the Commission's proposals are in this area (despite the rhetoric of commentors such as AT&T and MCI regarding the serious public health and safety need for measurements in this area), given the greater prophylactic performance requirements being accepted under industry self-regulation regimes.

[7] In what can only be described as a jewel of rhetoric, Ameritech is correct in its observation that "price and cost" of interconnection agreements are clearly tied to "terms and conditions." "That **is** why the price of raw hamburger differs from the price of cooked filet mignon." Ameritech at 10 (bold added). No performance measurement comes without a cost/price. The question is "is it worth it?" See discussion below regarding the critical nature of cost recovery associated with performance measurement regimes.

others, based on one's perspective).[8] Given the broad range of "appropriate" measurements, it is certainly inappropriate for the Commission to prescribe or "guide" the contract or regulatory process to adopt one over the other.[9]

Finally, those carriers that seek to engage this Commission in resolving issues unrelated to the basic definition of performance measurements and reporting (e.g., matters such as "self-effectuating penalties,"[10] which are clearly more appropriately dealt with *via* contract than federal regulatory mandate) urge advocacy on the Commission that -- if adopted -- is certain to result in contentious, protracted litigation. Even if the Commission had jurisdiction to prescribe performance measurements and reporting models (a proposition that U S WEST disputes, along with a host of other commenting parties), the consequences of "violating" such measurements or reporting obligations would not be forced "liquidated damages" provisions within the carrier-to-carrier relationship. Indeed, such provisions are intrinsically associated with privity of contract. Rather, the regulatory consequences would be realized in a different manner, such as Section

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[8] See, e.g., Ameritech at 9-11 (stating that there are "near infinite permutations of performance measurements" that might be advocated). U S WEST's initial decision not to comment on each of the Commission's specific proposed measurements appears to have been a sage one. The comments demonstrate a myriad of alternative measurements. Given that U S WEST will inevitably have to negotiate or defend the Commission's proposed measurements, as well as any other/different measurement proposed by any carrier or agreed to by any LEC in a state venue, resource allocation suggests that energies be devoted to that venue, rather than a paper war in the federal arena.

[9] Furthermore, the meager volume of State advocacy in this proceeding strongly suggests that States are not so much in need of "guidance" as the Commission might have originally thought.

[10] See, e.g., CompTel at 15-16; LCI at 12; MCI at 24-25.

208 complaints or denials of Section 271 filings.

Not only is litigation certain simply from a Commission exercise of authority over performance measurements, either in the form of a prescription or guidance, it is certain simply due to the "form" in which the Commission seeks to exercise its federal prerogative. A number of parties point out the strangeness of the Commission's "non-legally binding" "Model Rules,"[11] arguing that such approach violates the Administrative Procedure Act ("APA")[12] as well as common sense. Thus, even if the Commission remains resolute with respect to its pronounced tentative intentions (i.e., to adopt guidelines rather than binding rules), litigation is certain.

The Commission should be guided by U S WEST's initial advocacy, and that presented in a more articulated fashion by the Independent Telephone & Telecommunications Alliance ("ITTA"). To the extent that the Commission deems federal leadership in the area of performance measurements and reporting to be required, it should adopt -- at most -- "principles" to guide the States in this area. The principles proposed by ITTA are a good starting point, addressing: comparability,[13] data re-use,[14] sampling,[15] compliance auditing,[16] confidentiality,[17]

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[11] U S WEST was joined by Ameritech in our observation that such was an oxymoron. Ameritech at 12-14. See also USTA at i, 2-4; ALLTEL at iii, 4; BellSouth at 2.

[12] See, e.g., ALLTEL at 4; USTA at 2 (specifically referencing the APA).

[13] See ITTA at 14 (stressing the essential notion of "comparability" to any determination of nondiscrimination, as well as the need for appropriate transition time and consideration of consumer and market requirements).

[14] Id. at 14-15 (correctly stressing that regulatory authorities should support the "re-use" of data already collected by an incumbent carrier and seek to craft data collection and reporting requirements around that data. Determinations to go

geographic conformity,[18] sunsetting[19] and cost recovery. The articulation of such principles has proven effective in the area of numbering[20] and there is no reason to

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beyond current data collection should include, as an inherent part of the regulatory mandate, the cost recovery mechanism.).

[15] Id. at 15. It is quite possible that nondiscrimination can be proven through a sampling mechanism, without collecting total data or analyzing all data even where data is ubiquitously collected. Consideration should be given to sampling methodologies.

[16] Id. While ITTA argues that States, rather than private parties, should have auditing authority, U S WEST believes that auditing rights are an appropriate subject for contract negotiation. See U S WEST Comments at 34. From the perspective of federal leadership, we think an appropriate "auditing principle" might simply state that "auditing through some mechanism and in some form should be a part of the process."

[17] ITTA at 15. U S WEST thinks an appropriate confidentiality principle might simply read that "Carriers should take care to protect the confidentiality of data proprietary to either the incumbent measuring carrier or those carriers receiving reports."

[18] Id. U S WEST supports some principle around geographic measurement that stresses that data collection or reporting is presumptively appropriate at the level the incumbent currently utilizes and that other models must ensure cost recovery associated with further disaggregation.

[19] Id. U S WEST supports a regulatory model that would incorporate a sunsetting of data collection and performance measurements. Should carriers desire such information beyond the sunset date, contractual negotiations are sufficient to allow for the exchange of such information.

[20] For example, while the numbering principles do not reference specific "approved" or "disapproved" actions, they are sufficiently articulate such that it is fairly obvious what actions are consistent with the principles and what actions are not. For example, a wireless-only overlay clearly violates the principle regarding exclusion of groups of carriers based solely on "provision of a specific type of telecommunications service or use of a particular technology" (47 C.F.R. § 52.19(c)(3)(i)). Even if the Commission had not included the specific example in its discussion, it would have been reasonably clear that State action pursuing such an overlay was problematic from a federal interest perspective. See Implementation of the Local Competition Provisions of the Telecommunications Act, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd. 19392, 19516-520 ¶¶ 281-91 (1996).

assume it would not be equally effective in this context.[21]

II. COST RECOVERY IS CRITICAL

The adoption of principles such as those supported by ITTA incorporates the necessary cost/benefit considerations that a number of commentors assert,[22] and U S WEST agrees, are so critical. Cost recovery is a critical element of performance measurements and reporting regimes whether those regimes are negotiated, imposed by State regulatory commissions in their oversight capacity or associated with mandated or guiding federal Model Rules.

While U S WEST itself has not done the precise math, Bell Atlantic reports that the Commission's proposal would result in nearly 5,000 more measurements than Bell Atlantic currently provides, costing over $3.5 million in additional development costs.[23] Similarly, CBT estimates it would cost "millions of additional dollars" to implement the Commission's proposal,[24] while Frontier estimates an implementation cost of in excess of $5 million.[25] Where would this cost recovery

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[21] Indeed, a statement of principles would be superior to an "informal paper" (such as the sort suggested by Commissioner Furchtgott-Roth), assuming the latter would actually get into specific "ideal" measurements, while the former would not contain such detail. NPRM at Dissenting Statement of Commissioner Harold Furchtgott-Roth at 6.

[22] See Ameritech at 2, 16; Bell Atlantic at 7-8; CBT at iv, 4-5; BellSouth at 6; ITTA, passim.

[23] Bell Atlantic at 6-8.

[24] CBT at 10-11.

[25] Frontier at 4. And compare Ameritech at 16 (Ameritech's costs of compliance with respect to wholesale obligations is already substantial and the Commission's proposals "would effectively double these costs"); at 27 (an additional level of detail for a given measure should not be considered unless it adds meaning to that measure and the test is cost-effective).

come from?

While States -- such as the Washington Utilities and Transportation Commission ("WUTC") -- urge the FCC to adopt model guidelines and to build "national database[s] to facilitate state efforts to do [OSS] compliance monitoring and enforcement,"[26] they do not address the issue of cost recovery. Given the primary responsibility of the States in the area of Sections 251/252 compliance, federal action (whether in the name of "guidance" or "mandates") designed as a State aid raises serious issues with respect to the appropriate jurisdiction for cost-recovery purposes.

For example, States -- while clearly interested in having information available to them regarding other state initiatives[27] -- undoubtedly would not want to foot the tab for the creation of a database to fulfill this regulatory desire. Nor would the FCC want to be responsible for the cost. Why should carriers, then, be beholden to two regulatory authorities with respect to statutory compliance, particularly when the one seeks to act only in a "guiding" capacity? The answer is that they should not.

To the extent LECs incur costs for performance measurements/reports as a result of agreed-upon negotiations or State mandates (either in arbitration, mediation, or wholesale rulemakings), cost recovery is a matter confined to State responsibility. The FCC's proposal only confuses that responsibility in a manner that will predictably render cost recovery for ILECs precarious if not impossible.

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[26] WUTC at 4.

Independent of any other legal issue associated with the FCC's proposal, failure to ensure cost recovery will result in future litigation.

III. CONCLUSION

For all of the above reasons, the Commission should terminate the NPRM or significantly recraft its structure from Model Rules to Principles. Cost recovery associated with any federal initiative should be explicitly addressed and carriers should not be left "holding the bag" for expensive federal programs that States "like" but do not want to support from a cost recovery perspective.

Respectfully submitted,

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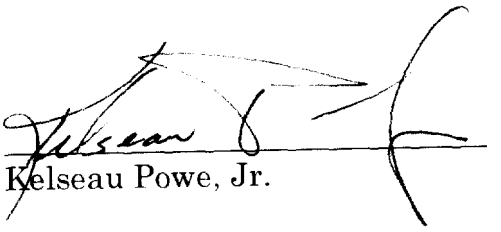
[27] Id. at 6-7, 21.

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 6th day of July, 1998, I have caused a copy of the foregoing **REPLY COMMENTS OF U S WEST, INC.** to be served, via United States mail, postage pre-paid, upon the persons listed on the attached service list.



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